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In The

Supreme Court of the United States

October Term, 1969

No. 1031

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, DAVID G. RALL and R. E. LEE,

Petitioners,

vs.

NORTHWEST AIRLINES, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The respondent, Northwest Airlines, Inc., submits this Brief in opposition to the petition of Air Line Pilots Association, International, David G. Rall and R. E. Lee for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on September 9, 1969. In accordance with Rule 40, subd. 3, of this Court, we accept the petitioners' recital of the lower court opinions, invocation of the jurisdiction of this Court under 28 U.S.C. § 1254(1), and citation of relevant statutory provisions. However, we believe that petitioners' formulation of the question presented requires revision, and that their statement of the case is deficient in certain respects.

QUESTION PRESENTED

Whether a federal court may grant attorneys' fees to the prevailing party in an action to enforce awards of an Airline System Board of Adjustment established by contract between Northwest Airlines, Inc. and Air Line Pilots Association, International, where there is no provision in that contract for attorneys' fees.

STATEMENT OF CASE

We object to petitioners' invocation of federal district court jurisdiction under 45 U.S.C. § 153, and contend, in accordance with the holding of this Court in *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963), that such jurisdiction is based solely upon 28 U.S.C. §§ 1331 and 1337.[1]

This is a suit to enforce two awards by Northwest Airlines Pilots' System Boards of Adjustment. Air Line Pilots Association, International (hereinafter "ALPA") and Northwest Airlines, Inc. (hereinafter "NWA") have entered into agreements concerning the disposition of certain "minor disputes." [2] The procedure is spelled out in Section 31 of their Agreement dated July 23, 1960. IA. 18.[3] From an

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[1]Of course, petitioners' reference to 45 U.S.C. § 184 as a jurisdictional basis is appropriate to the extent that that section requires Northwest Airlines, Inc. and Air Line Pilots Association, International to create a system board of adjustment by contract, which contract controls the rights and obligations of these parties.

[2]The Railway Labor Act, 44 Stat. 577 (1926), 45 U.S.C. § 151, *et seq.*, prescribes different procedures for the settlement of disputes between carriers and their employees, depending on the nature of the dispute. Courts have devised the terms "minor dispute" for disagreements concerning the interpretation of an existing contract, and "major disputes" which arise when a new contract is sought. *See* Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30, 33 (1957).

[3]As petitioners have done, we shall refer to Volume I of the two-volume Appendix submitted to the Eighth Circuit Court of Appeals as "IA."

adverse decision at the highest company level, the pilot may appeal to the Northwest Airlines Pilots' System Board of Adjustment. IA. 20-21. This System Board was created by an agreement between NWA and ALPA. IA. 11-17.

In October and November, 1964, two separate but identical Northwest Airlines Pilots' System Boards held hearings to consider the action of NWA in discharging Captain David G. Rall and Robert E. Lee from their positions as pilots for NWA on February 28, 1964, effective February 9, 1964. Evidence adduced at those hearings indicated that David G. Rall was captain on a charter Flight N027 on January 1, 1964, which flew from Hickam Air Force Base, Honolulu, Hawaii, carrying military personnel to Eniwetok. IA. 22. In connection with that flight, Rall violated the NWA rule (and the ALPA rule) prohibiting the use of alcoholic beverages by any pilot within twenty-four hours of departure of a flight on which he is a crew member. IA. 22-23. In fact, Rall reported for the flight in an intoxicated condition and concealed himself in the aircraft to avoid being seen prior to takeoff. IA. 33. He failed to attend the weather briefing and otherwise carry out his pre-flight duties. IA. 33.

The evidence further revealed that Robert E. Lee served as a co-pilot on that same flight with a pilot having an apparent physical deficiency. IA. 26. Lee regarded Rall as drunk and unable to carry out his duties as pilot of the aircraft and yet proceeded to fly the airplane out. IA. 35.

In both cases the System Board upheld disciplinary action and refused to exonerate the individuals involved, but nevertheless ordered re-employment after periods of disciplinary layoff without pay.[4] When NWA declined to reinstate them, ALPA, Rall and Lee (collectively "ALPA")

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[4]Rall was ordered re-employed as of November 1, 1964, and Lee was ordered re-employed as of May 1, 1964. IA. 24, 27.

commenced this action on February 11, 1965. The remainder of the procedural history involved in this litigation has been set forth in petitioners' statement of the case and need not be repeated here.

ARGUMENT

INTRODUCTION

Under Rule 19 of this Court, review on a writ of certiorari will be granted only where there are "special and important reasons" therefor. The strict standard which a petitioner for a writ of certiorari must meet has been articulated many times by this Court. It is clear that petitioners here have not met their burden of demonstrating the presence of such reasons. The question presented here does not involve an important question of federal law, since it may be resolved by the parties simply by negotiating an amendment to their contract; and it already has been settled by Congress and by this Court. Furthermore, the decision of the Eighth Circuit Court of Appeals in this case does not conflict with decisions of other courts of appeal; that decision in no way conflicts with that of this Court in *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963), but rather is required by that decision. For these reasons, respondent requests that the petition for a writ of certiorari be denied.

I. THE COURT OF APPEALS' DECISION CONCERNING RECOVERABILITY OF ATTORNEYS' FEES DOES NOT INVOLVE AN IMPORTANT QUESTION OF FEDERAL LAW, AND EVEN IF IT DOES, THAT QUESTION ALREADY HAS BEEN SETTLED BY CONGRESS AND BY THIS COURT

Petitioners concede that attorneys' fees cannot be allowed by a federal court absent contractual or statutory authority for such an award.[5] Indeed, petitioners have no other choice in view of this Court's recognition and application of that rule, most recently in *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967). Apparently petitioners also concede that there is no contractual authority for such an award herein, as they fail to point to any provision in the contract between the parties authorizing such an award.[6] Finally, petitioners concede that there is no direct statutory authority for an award of attorneys' fees herein since 45 U.S.C. §§ 181-182 do not make § 153 applicable to airlines.[7]

Thus, petitioners are left with the sole contention that the general provisions of the "Railway Labor Act, 45 U.S.C., § 151 et seq.," looked at "as a whole," do more than the language says they do, namely, authorize an award of attorneys' fees herein. We submit that this question is not of sufficient importance to necessitate review by this Court, and, in any event, it already has been resolved by Congress and by this Court.

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[5]Petition for a Writ of Certiorari, p. 11.

[6]Petitioners do call attention to that provision in the contract which continues the operation of any provisions of the Railway Labor Act *which might otherwise be applicable.* Petition for a Writ of Certiorari, p. 12, n. 3. The only provision of the Railway Labor Act authorizing attorneys' fees, 45 U.S.C. § 153, is not applicable to airlines, as will be shown in this Brief. Thus, the aforementioned contractual provision in no way authorizes an award of attorneys' fees in this case.

[7]Petition for a Writ of Certiorari, p. 11.

A. The Question Raised by Petitioners Is Not of Sufficient Importance to Necessitate Review by This Court.

Review on writ of certiorari generally is not granted where only the interest of the litigants themselves, as opposed to that of the public or a larger segment of the community, is involved. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955); *accord, Rudolph v. United States*, 370 U.S. 269 (1962); *Layne & Bowler Corp. v. Weston Well Works, Inc.*, 261 U.S. 387 (1923). We submit that there is no overriding public interest in the question presented. The reason, simply stated, is that air carriers and their unions have full contractual capacity to provide for the award of attorneys' fees in proceedings like this one.

This proceeding involves an action to enforce awards of a contractually created board of adjustment possessing jurisdiction over minor disputes in the NWA System. The contract does not contain a provision for reimbursement of attorneys' fees. If provisions governing attorneys' fees are desirable, it is a negotiable matter for bargaining by the parties, and by other air carriers and their unions, as yet another set of rules or working conditions in a collective bargaining context. Neither legislation nor reversal of court decisions is necessary to effect the policy which petitioners contend ought to be fixed and implemented. Such a policy can properly be tested and established only in collective bargaining where it can be weighed by the parties to the negotiations, sophisticated in the techniques and ramifications of such bargaining.

Under 45 U.S.C. § 184, air carriers and their unions are required to create, by contract, system, group or regional boards of adjustment as follows:

> It shall be the duty of every [air] carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181-188

> of this title, to establish a board of adjustment of jurisdiction *not exceeding* the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title. (Emphasis supplied).

NWA and ALPA complied with § 184 by a contract which established the Northwest Airlines Pilots' System Board of Adjustment in complete detail. They provided, with clarity, for the manner in which the Board was to be created and operated and the disputes within its jurisdiction.[8] They also provided for the degree of administrative finality which decisions of that Board were to have,[9] and they provided for the event of a deadlock in the Board.[10] Yet, though the parties set forth all of these provisions in detail, and clearly *could* have included a provision concerning attorneys' fees incurred in proceedings to *enforce* the Board's awards, they did not do so. Furthermore, not only *could* the parties to this proceeding have contracted for payment of attorneys' fees, but they *still can* through future negotiations. The same is true of other air carriers and their unions.[11]

In these circumstances, the Eighth Circuit Court of Appeals very properly ruled that it was neither its prerogative nor its responsibility to write a provision into the agree-

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[8] IA. 11-17.

[9] "Decisions of the Board in all cases properly referable to it shall be final and binding upon the parties hereto." IA. 15. Note that by the terms of this provision alone, without reference to 45 U.S.C. § 153, awards of the Northwest Airlines Pilots' System Board of Adjustment can be held final and binding.

[10] IA. 15.

[11] It is for this reason that petitioners are incorrect when they argue that no airline employees would retain the system boards in lieu of the National Air Transport Adjustment Board, authorized by 45 U.S.C. § 185, if attorneys' fees are not allowed in cases such as the present one. Petition for a Writ of Certiorari, p. 15. There is a plain avenue to such a provision which requires neither legislative nor judicial intervention.

ment which the parties did not. Neither is it the burden of this Court to review a question which bears significance only for these particular petitioners in this particular proceeding,[12] and not for the general public, the airlines, or the employees in the airline industry and their unions.

B. The Question Raised by Petitioners Already Has Been Settled by Congress and by This Court.

1. Congress Did Not Make § 153 Applicable to Air Carriers.

In their attempt to create the atmosphere of an "unsettled" question concerning the recoverability of attorneys' fees, petitioners' argument seems to proceed as follows: (1) the parties entered into a contract under § 184 which gave their System Board jurisdiction over grievances, which jurisdiction did not exceed that of Railroad Boards authorized under § 153; (2) the contract complied with the provisions of § 184; (3) Railroad System Board awards are subject, by virtue of the provisions of § 153 Second, to the same enforcement provisions as those applicable to the National Railroad Adjustment Board; (4) attorneys' fees are awarded to successful petitioners in federal court proceedings to enforce National Railroad Adjustment Board awards under § 153 First (p); and (5) therefore, reading these provisions "in the context of the Railway Labor Act as a whole and in the context of the Railway Labor Act's history," recovery of attorneys' fees is authorized herein.

The difficulty with this argument is that it is founded on statutory provisions which are not applicable to Airline

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[12] Since ALPA presumably is able to pay attorneys' fees incurred in protecting its members, it is unlikely that even the *individual petitioners here* would have been discouraged from the commencement of litigation, or will be prejudiced in any way, by a refusal to award attorneys' fees.

System Boards, and it then sweeps to its final conclusion by invoking the Railway Labor Act "as a whole," as well as its general "history." Of course, even after completing these mental gymnastics, petitioners still are unable to direct the Court to a single statutory provision authorizing an award of attorneys' fees, nor have we found any such provision.[13]

In adopting the so-called Air Carrier Amendments to the Railway Labor Act in 1936, Congress extended all of the provisions of the Railway Labor Act *except* § 153 to airlines. Congress said:

> § 181. Application of sections 151, 152, and 154-163 to carriers by air.
>
> All of the provisions of sections 151, 152, and 154-163 of this title are extended to and shall cover every common carrier by air. . . .
>
> § 182. Same; duties, penalties, benefits and privileges.
>
> The duties, requirements, penalties, benefits and privileges prescribed and established by the provisions of sections 151, 152 and 154-163 of this title shall apply to said carriers by air and their employees. . . .

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[13]It is unclear exactly what legal importance petitioners attach to our comments in a previous Brief regarding the workings of § 153 First (p). Petition for a Writ of Certiorari, p. 10, n. 2. First of all, petitioners choose to quote out of context. In that same Brief we said as follows: "Appellant [NWA] has assumed *arguendo* that Awards of the Northwest Airlines Pilots' System Board of Adjustment are accorded the same degree of finality as Awards of the National Railroad Adjustment Board. This assumption should not be made. The statute, the contract and the facts require different treatment of the awards of Railroad *vis-a-vis* Airline System Boards." Appellant's Brief, p. 38, Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Int'l, 373 F.2d 136 (8th Cir. 1967). We then pointed out, as we have here, that § 153 does not apply to Airline System Boards. In any event, it hardly matters what position we may have taken in the past on the degree of finality of Airline Board awards, since this is irrelevant to the question of federal court authority to award attorneys' fees.

45 U.S.C. §§ 181, 182.[14]

For the railroad industry, Congress adopted § 153, which deals with (1) the establishment, composition, powers and duties, division, hearings and awards of the National Railroad Adjustment Board, and (2) the establishment of railroad system, group or regional boards by voluntary agreement. For the airline industry, in place of § 153, Congress provided in 45 U.S.C. § 185 for the creation of an equivalent National Air Transport Adjustment Board, but postponed this until "in the judgment of the National Mediation Board, it shall be necessary to have a permanent national board of adjustment. . . ." By the express language of § 185, only in the event such a permanent Airline Board is established will its awards be enforced in accordance with § 153.[15]

In the meantime, and until the National Mediation Board determines the necessity of establishing a permanent National Air Transport Board, § 184 simply requires that air

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[14]In addition to the obvious absence of "section 153" from these statutory provisions, the legislative history of the Air Carrier Amendments explicitly recognizes the inapplicability of § 153 to airlines. In hearings on the Amendments, ALPA's own representative testified:

> "As we interpret the bill, it would apply to air transportation all of the provisions of the Railway Labor Act with the exception of section 3. [45 U.S.C. § 153]. Section 3 is that provision of the act which establishes a National Railroad Adjustment Board. It is the only provision in the act which is peculiarly adapted to the railroads. All of the other provisions are such that they may be applied to any industry without modification."

Hearings on S. 2496 Before a Subcomm. of the Senate Comm. on Interstate Commerce, 74th Cong., 1st Sess. 3 (1935).

The House Report states, "This bill [S. 2496] applies all of the provisions of the Railway Labor Act except Section 3 to common carriers by air and their employees." H.R. Rep. No. 2243, 74th Cong., 2d Sess. 1 (1936).

[15]The legislative history set forth in the Petition for a Writ of Certiorari, pp. 16-17, nn. 12-13, refers to this yet non-existent *National* Air Transport Adjustment Board. Nowhere in this history does it suggest that Airline *System* Board contracts must incorporate all of the provisions of § 153, nor does it suggest that if the parties fail to do so, then those provisions automatically will be incorporated for them.

carriers and their unions create Airline System Boards of Adjustment with jurisdiction not exceeding that which may be exercised by Railroad System Boards. Clearly, the parties to a § 184 airline contract may *not* confer upon an Airline System Board jurisdiction which exceeds that of the § 153 Railroad System Board jurisdiction, and they must, by judicial view, give awards of an Airline Board "*some* degree of finality." *International Ass'n of Machinsts v. Central Airlines, Inc.*, 372 U.S. 682, 694 (1963). Beyond this, § 184 contains absolutely no language which imports or even suggests incorporation of any other part of § 153 into the operation of, or enforcement of awards by, an Airline System Board created pursuant to § 184.

And even if the parties herein exercised their § 184 prerogative and provided in their contract that the *System Board* should have *jurisdiction* equal to that of a § 153 Railroad Adjustment Board, this still would not empower a federal *court*, in an action for *enforcement* of the Airline Board's award, to grant attorneys' fees, unless the parties also specifically contracted for such fees. To paraphrase, there is no statutory grant of authority to a federal court to do more than enforce an Airline System Board contract. Whether such contracts provide for "some degree of finality" or "ultimate finality" of an Airline System Board award, there must be an independent contractual basis for payment of attorneys' fees. Otherwise, there is nothing for a federal court to enforce in this regard, beyond ruling on the appropriate degree of finality and requiring compliance.

Although Congress did not impose the provisions of § 153 on Airline System Boards, it knows how to do so. In § 185, Congress found no difficulty in repeatedly and specifically referring to and incorporating the provisions of § 153 into the operation of the yet non-existent National Air Transport Adjustment Board. One portion of § 185 provides:

> [M]embers of the National Air Transport Adjustment Board shall be compensated, hearings shall be held, findings and *awards made*, stated, served *and enforced*, and the number and compensation of any necessary assistants shall be determined and the compensation of such employees shall be paid, all in the same manner and to the same extent as provided with reference to the National Railroad Adjustment Board by section 153 of this title.

45 U.S.C. § 185. (Emphasis supplied).

Furthermore, in recent amendments to § 153 Second, Congress specifically provided that compliance with awards of the *Railroad System* Boards permitted by that section:

> . . . shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the [National Railroad] Adjustment Board.

45 U.S.C. § 153 Second (1964), *as amended*, (Supp. II, 1965-66). No such amendment was enacted with respect to *Airline System* Boards which have contractual status creating "arising under" or "commerce" jurisdiction only by reason of 28 U.S.C. §§ 1331 and 1337. *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963).

In the original 1936 Air Carrier Amendments to the Railway Labor Act, Congress provided that § 153 would apply to the National Air Transport Adjustment Board only if it were to be created. In 1966, Congress made § 153 applicable to *Railroad System* Boards created by contract. It did not choose to make § 153 applicable to contractual *Airline System* Boards in spite of the fact that Congress is manifestly aware of its power to make specific provision for such application.

These circumstances alone are sufficient to describe as deliberate, rather than inadvertent, the failure of the 1966 Congress to apply § 153 to Airline System Boards. This conclu-

sion is further supported by sound reason and common sense. Air carriers and their employees are required by § 184 to establish Airline System Boards of Adjustment by contract. The manner and method by which such boards operate, as well as the obligations or rights attendant upon such operation, is left, with the exception that they must provide some degree of finality for awards, to the negotiating capabilities of the parties. If the parties to Airline System Board contracts wish to agree to pay attorneys' fees or other costs of Airline System Board proceedings or award enforcement, they may, of course, do so. They have not done so in the contract now under consideration, except by agreeing on expenses incurred at the System Board level. Congress has neither required nor authorized more.

Thus, petitioners are patently in error when they claim that airlines and their employees are to have "*precisely* the same remedies as were provided railroads and their employees." They are also in error when they contend that airlines and their employees are to be treated "identically to railroads and their employees." They are finally in error when they state that the only difference between a contractual Airline System Board and the NATAB is one of permanency or lack thereof.[16]

2. This Court Has Settled the Question of Applicability of § 153 to the Airlines in International Ass'n of Machinists v. Central Airlines, 372 U.S. 682 (1963).

Though petitioners claim to have considered the provisions of the Railway Labor Act "as a whole," as well as their "history," it is clear that ultimately the statutory provision upon which they must rely for an award of attorneys' fees herein is 45 U.S.C. § 153. No amount of discussion or rhetoric can

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[16]See Petition for a Writ of Certiorari, pp. 15-16.

obfuscate this central fact. Thus, we still are left with the question of whether that section is applicable to the airlines. On the basis of the above statutory analysis, it is clear that it is not. This conclusion also is supported directly by this Court's decision in *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963).

Prior to *Central Airlines*, the question of applicability of § 153 to the airlines was first brought sharply into focus in *Metcalf v. National Airlines, Inc.*, 271 F.2d 817 (5th Cir. 1959). In *Metcalf*, airline employees sought to enforce, in federal court, awards of an Airline System Board which had been established by their contract. The airline contended that the court lacked jurisdiction to enforce that award, and moved to dismiss. The motion was granted, the court ruling against jurisdiction because §§ 181-182 of the Air Carrier Amendments specifically excluded application of § 153 to airlines and restricted its impact to railroads. In holding that § 153 did not confer jurisdiction upon federal courts to enforce an award of an *Airline* System Board, the court considered the exact nature of the relationship between § 153 and air carriers:

> Thus, the legislative scheme is complete. All the provisions of the Railway Labor Act are adopted for the air industry except section 153; instead of giving similar relief to 153, special provision is made for adjustment of labor disputes by system or regional boards with no legislative determination as to their finality or as to their being the basis of federal suit jurisdiction; but all of the provisions of Section 153 are brought into play, including the right granted in subsection (p) to sue on an award in the federal district court, *when and if the National Mediation Board exercised the judgment granted it in Section 185.*
>
> * * *
>
> We conclude that the legislative design of Congress is clearly expressed. Such design is to grant to those win-

> ning arbitration awards the right to sue on them in federal courts only when and if the Mediation Board creates a National Air Transport Adjustment Board whose award is ignored or not complied with by the carrier. Then only does Section 153 (p) become operative in the air industry.

271 F.2d at 819, 820. (Emphasis supplied).

Two years after the *Metcalf* case, the Fifth Circuit was again faced with the issue of whether a federal court has jurisdiction to enforce an award of an Airline System Board established pursuant to contract. *International Ass'n of Machinists v. Central Airlines, Inc.*, 295 F.2d 209 (5th Cir. 1961). In view of the holding in *Metcalf*, the petitioning employees in the *Central Airlines* case sought a jurisdictional base other than § 153, and argued that federal court jurisdiction could be predicated upon 28 U.S.C. §§ 1331 and 1337. These sections provide for federal court jurisdiction over matters "arising under" a federal law or "a civil action or proceeding arising under act of Congress regulating commerce" (commonly referred to as "arising under" and "commerce" jurisdiction). Nevertheless, the Fifth Circuit rejected the petitioners' contentions and held that there was no federal court jurisdiction under any statute over suits to enforce the award of an Airline System Board.[17]

When petitioners requested review of the decision of the Fifth Circuit in *Central Airlines*, this Court was presented with and took the opportunity to dispel the confusion surrounding the applicability of § 153 to the airline industry. *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963). In reviewing the decision of the court

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[17]Both this decision and the *Metcalf* case were later cited by a federal district court in Missouri in holding that federal court jurisdiction to enforce the award of an Airline System Board could not be predicated either upon § 153 or upon §§ 1331 and 1337. Air Line Pilots Ass'n, Int'l v. Trans World Airlines, Inc., 203 F.Supp. 438 (W.D. Mo. 1962).

below, this Court clearly held that air carriers are not covered by § 153. This Court reasoned that the aim of the 1936 Air Carrier Amendments:

> . . . was to extend to air carriers and their employees the same benefits and obligations available and applicable in the railroad industry. But there was to be a significant variation. The 1936 amendments made applicable to the airlines all of the provisions of the Railway Labor Act, *excepting* § *3*, 45 U.S.C. § 153, dealing with the National *Railroad* Adjustment Board. . . .

372 U.S. at 685. (Emphasis supplied). This Court concluded, therefore, that federal court jurisdiction over such actions could not be predicated upon the provisions of 45 U.S.C. § 153 First (p). But it also rejected the conclusion of the Fifth Circuit that the federal courts lacked jurisdiction on any other statutory basis to enforce the awards of contractually created Airline System Boards. This Court held in *Central Airlines* that although the provisions of § 153 are inapplicable to matters arising out of contracts establishing Airline System Boards, the federal courts do have jurisdiction, nonetheless, to enforce the awards, based on "arising under" jurisdiction (28 U.S.C. § 1331) or on "commerce" jurisdiction (28 U.S.C. § 1337). 372 U.S. at 696.

The force of the *Metcalf* case is in no way diminished by this Court's decision in *Central Airlines*, since this Court did adopt the position of *Metcalf* that federal jurisdiction is not conferred by § 153. It went on to find jurisdiction existed pursuant to 28 U.S.C. §§ 1331 and 1337. Hence, § 153 provides no subject matter jurisdiction to the federal courts in Airline cases, while providing the only statutory authority for the award of attorneys' fees in Railroad cases.

In view of the express holding of this Court in *Central Airlines*, the conclusion is inescapable that the provisions of § 153 are not applicable to the air carriers, that that section

does not authorize enforcement of awards of contractually created Airline System Boards, and that federal jurisdiction to enforce awards of Airline Boards is on a parity with other federally cognizable contract actions in which there is also no statutory basis for awarding attorneys' fees.[18] Thus, respondent submits that the question raised in the petition for certiorari herein already has been settled.

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL, EITHER AS TO THE QUESTION OF ATTORNEYS' FEES OR THAT OF THE BASIS FOR FEDERAL COURT JURISDICTION

Petitioners cite authorities which they claim support the proposition that § 153 applies to awards of Airline System Boards, and, therefore, that the Eighth Circuit decision refusing to apply the provision of § 153 First (p) concerning attorneys' fees is in conflict with those decisions.[19] No such "conflict" exists, upon proper scrutiny of those authorities.

In pre-*Central Airlines* decisions, cited by petitioners, involving Airline System Boards, the courts failed to analyze the language of §§ 184 and 185 closely, and this resulted in considerable confusion as to the applicability of § 153 to air

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[18] In a recent Fifth Circuit case, Rosen v. Eastern Air Lines, Inc., 400 F.2d 462 (5th Cir. 1968), two flight attendants had sought review of the Airline System Board decision denying them relief. The court noted that they were not entitled to judicial review, and with respect to the airline's argument that the employees failed to state a cause of action under 45 U.S.C. § 153 the court commented that, "[I]t is novel since this section is not applicable to airlines." In doing so, the court cited the *Central Airlines* case as well as 45 U.S.C. §§ 181, 182 and 184.

[19] Petition for a Writ of Certiorari, pp. 18-19.

carriers.[20] In none of those cases did the parties raise, nor did the court expressly rule upon, the specific question of whether § 153 was applicable to Airline System Boards established pursuant to § 184. When this exact question *was* raised before the Fifth Circuit in *Metcalf* and this Court in *Central Airlines*, the confusion was eliminated by clear rulings that § 153 was *not* applicable to airlines. Thus, the majority of the cases cited by petitioners are of no precedential value.

Aside from the above pre-*Central Airlines* authority, petitioners cite three courts of appeal decisions which they claim sustain their position.[21] Again, however, close examination of these decisions reveals no such support. None of the three cases contains any holding regarding the applicability of § 153 to the airlines.[22] Furthermore, none of the three cases, even "by implication," deals with anything more than the

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[20]Flight Engineers Int'l Ass'n v. American Airlines, Inc., 303 F.2d 5 (5th Cir. 1962); Arnold v. United Air Lines, Inc., 296 F.2d 191 (7th Cir. 1961); Woolley v. Eastern Air Lines, Inc., 250 F.2d 86 (5th Cir. 1957), *cert. denied*, 356 U.S. 931 (1958); Sigfred v. Pan American World Airways, Inc., 230 F.2d 13 (5th Cir.), *cert. denied*, 351 U.S. 925 (1956); Edwards v. Capitol Airlines, Inc., 176 F.2d 755 (D.C. Cir.), *cert. denied*, 338 U.S. 883 (1949); Bates v. Northwest Airlines, Inc., 171 F.Supp. 273 (D. Minn. 1959); Crusen v. United Air Lines, Inc., 141 F.Supp. 347 (D. Colo.), *aff'd*. 239 F.2d 863 (10th Cir. 1956); Farris v. Alaska Airlines, Inc., 113 F.Supp. 907 (W.D. Wash. 1953); International Union, UAW v. Delta Air Lines, Inc., 83 F.Supp. 63 (N.D. Ga. 1949).

[21]Transport Workers Union of America v. American Airlines, Inc., 413 F.2d 746 (10th Cir. 1969); Kelley v. Eastern Air Lines, Inc., 389 F.2d 478 (5th Cir. 1967); Capitol Airways, Inc. v. Air Line Pilots Ass'n, Int'l, 341 F.2d 288 (6th Cir.), *cert. denied*, 381 U.S. 952 (1965).

[22]In the *Transport Workers* case, the only issue facing the court was one of election and exhaustion of administrative remedies by the union. In the *Kelley* case, the issue was whether the federal district court had properly dismissed an employee's action for damages for unlawful discharge where the system board had found that the employee had submitted a proper letter of resignation. In the *Capitol Airways* case, a minor procedural question was involved, and the court stated that such questions are to be determined by the system board, not by a federal district court on review.

finality requirement; none of them mentions attorneys' fees.

Finally, petitioners cite certain *district* court authorities in alleged support of the proposition that there is a conflict in the decisions regarding applicability of § 153 to airlines.[23] Two circuit courts of appeal, the Fifth Circuit in *Metcalf* and the Eighth Circuit in the instant case, as well as this Court in *Central Airlines,* have directly ruled that § 153 does not apply. We know of no courts of appeal which have ruled otherwise. This ample authority disposes of the district court decisions relied upon by petitioners. Moreover, the district court decisions, again, involve primarily the finality requirement (and in the *Gordon* case, the statute of limitations question), not an award of attorneys' fees. To the extent that those cases seem to find § 153 to be applicable to airlines, they are simply wrong.

Petitioners claim further "conflict" between the Eighth Circuit's decision in the instant case and the Tenth Circuit's decision in the *Transport Workers* case on the matter of the bases for federal court jurisdiction.[24] In its recent decision in the instant case, the Eighth Circuit properly corrected its initial decision, and noted that federal court jurisdiction is based upon 28 U.S.C. §§ 1331 and 1337, not on 45 U.S.C. § 153. *Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc.*, 415 F.2d 493, 498 (8th Cir. 1969). In the *Transport Workers* case, the Tenth Circuit noted that the jurisdiction in the complaint was based on 28 U.S.C. §§ 1331, 1332, 1337 and 45 U.S.C. § 184, no mention being made of 45 U.S.C. § 153 in this context. Thus, we fail to see any conflict what-

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[23]Thorgeirsson v. Trans World Airlines, Inc., 288 F.Supp. 71 (S.D.N.Y. 1968); Dominguez v. National Airlines, Inc., 279 F.Supp. 392 (S.D.N.Y. 1968); Gordon v. Eastern Air Lines, Inc., 268 F.Supp. 210 (W.D. Va. 1967); Hyland v. United Air Lines, Inc., 254 F.Supp. 367 (N.D. Ill. 1966).

[24]Petition for a Writ of Certiorari, pp. 26-28.

soever. And we certainly do not agree that the language quoted by petitioners "directly conflicts" with the Eighth Circuit's comments concerning federal court jurisdiction.[25]

We submit that there is no conflict in the decisions of the circuit courts, nor any others, which necessitates resolution by this Court. It is equally clear that the Eighth Circuit's decision herein and this Court's decision in *Central Airlines* are in complete accord.

III. THE COURT OF APPEALS' DECISION IN NO WAY CONFLICTS WITH THE DECISION OF THIS COURT IN CENTRAL AIRLINES, BUT RATHER IS REQUIRED BY THAT DECISION

As a last resort, petitioners seem to contend that this Court should grant review because the decision of the Eighth Circuit is in conflict with that of this Court in *Central Airlines*.[26] We agree that, in order to accommodate the "statutory scheme," Congress provided for the mandatory establishment of Airline *System* Boards of Adjustment, pending determination of the necessity for a *National* Air Transport Adjustment Board which would be governed by the terms of 45 U.S.C. § 185. Indeed, Congress intended no hiatus in the field of airline industry labor relations, and that was the basis for this Court's holding in *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963), that federal courts do have jurisdiction under 28 U.S.C. §§ 1331 and 1337 to enforce the awards of the mandatory Airline System Boards.

Petitioners somehow conclude from this Court's *Central Airlines*' comment that Airline System Board awards prob-

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[25]See Petition for a Writ of Certiorari, pp. 26-27. The language quoted there appears in the prefatory remarks in the Tenth Circuit's opinion. There was no issue or holding as to jurisdictional bases, since the action was brought pursuant to 28 U.S.C. §§ 1331 and 1337.

[26]Petition for a Writ of Certiorari, pp. 22-26.

ably are to be given "some degree" of finality, that all of the provisions of § 153, including that authorizing a federal court to award attorneys' fees, are applicable to this proceeding. We find nothing in the *Central Airlines* decision which supports such a conclusion.[27]

Nor do we find anything in *Central Airlines* which conflicts with the Eighth Circuit's comments concerning federal jurisdiction, a still more remarkable contention made by petitioners.[28] As pointed out in detail earlier in our Brief,[29] it was expressly held in *Metcalf* that 45 U.S.C. § 153 does not provide jurisdiction for a federal court to enforce an award of an Airline System Board. *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963), expressly recognized that § 153 does not apply to airlines, but held that the general jurisdictional provisions of 28 U.S.C. §§ 1331 and 1337 do confer *jurisdiction* upon federal courts to enforce awards of Airline System Boards.

The language of this Court quoted from *Central Airlines* at p. 16 of our Brief is a clear and unambiguous statement that § 153 does not apply to Airline System Boards. And certainly this Court would not have reasoned, as it did, to find a jurisdictional base in other statutory provisions if it had considered that *Metcalf* was wrong and that § 153 did in fact provide jurisdiction. In view of these circumstances, we submit that petitioners misread this Court's decision in *Central Airlines* in contending that §§ 1331 and 1337 are not the exclusive bases of federal court jurisdiction to en-

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[27]Petitioners imagine a myriad of drastic problems if attorneys' fees are not allowed in this proceeding. Petition for a Writ of Certiorari, p. 25. Here we remind the Court that the parties can avoid all of these alleged problems simply by including a provision for payment of attorneys' fees in their § 184 contract. See Part I.A., *supra*, pp. 6 to 8.

[28]Petition for a Writ of Certiorari, p. 28, n. 20.

[29]See Part I.B.2, *supra*, pp. 13 to 17.

force Airline System Board awards.[30] Only if the Eighth Circuit ruled otherwise herein would there be a conflict between its decision and *Central Airlines*. As it is, the Eighth Circuit has brought itself into perfect accord with this Court on the issue of the proper bases for federal court jurisdiction. We submit that nothing in the decision of the Eighth Circuit violates the teachings of *Central Airlines*, and that review by this Court is unnecessary to establish this obvious point.

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[30]Even assuming, *arguendo*, that § 153 also does provide jurisdiction, it does not "logically follow," as claimed at p. 29 of the Petition for a Writ of Certiorari, that the portion of § 153 concerning attorneys' fees also applies. The Eighth Circuit met this contention head on with the following language, quoted by petitioners themselves in their statement of the case:

> In any event, a finding of jurisdiction under § 153 would not solve petitioners' problem on the attorney fee issue. Forty-five U.S.C.A., § 184, creates authority on the part of contracting parties to confer on the System Board of Adjustment jurisdiction not exceeding that of a § 153 board, but it does not demand that jurisdiction be equal to that of a § 153 board. The parties by their contract creating the board made no provision for attorneys' fees, and we find nothing in the statutes which required them to do so. Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc., 415 F.2d 493, 498 (8th Cir. 1969).

CONCLUSION

The question presented here does not involve an important question of federal law, since it may be resolved by the parties simply by negotiating an amendment to their contract; and it already has been settled by Congress and by this Court. Furthermore, the decision of the Eighth Circuit Court of Appeals in this case does not conflict with decisions of other courts of appeal; and that decision in no way conflicts with that of this Court in *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963), but rather is required by that decision. Therefore, we submit that this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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